

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDWARD WASHELL,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:14-CV-3071-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 14, 18. Attorney Cory J. Brandt represents Edward Washell (Plaintiff); Special Assistant United States Attorney Diana Andsager represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income (SSI) on September 10, 2010, alleging disability

1 since July 18, 2010, due to COPD, spinal stenosis, hepatitis C and arthritis in knees
2 and hips. Tr. 206. The applications were denied initially and upon
3 reconsideration. Administrative Law Judge (ALJ) Ilene Sloan held a hearing on
4 December 19, 2012, Tr. 50-73, and issued an unfavorable decision on February 7,
5 2013, Tr. 9-19. The Appeals Council denied review on April 22, 2014. Tr. 1-4.
6 The ALJ's February 2013 decision became the final decision of the Commissioner,
7 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
8 filed this action for judicial review on May 29, 2014. ECF No. 1, 4.

9 **STATEMENT OF FACTS**

10 Plaintiff was born on March 6, 1965, and was 45 years old on the alleged
11 onset date, July 18, 2010. Tr. 55, 202, 206. Plaintiff went to school through the
12 ninth grade and has not obtained a GED. Tr. 55, 207, 289. He stated he last
13 worked in April 2008 as a welder. Tr. 55, 206-207. His "Disability Report"
14 indicates the reason he stopped working in 2008 was "I was let go because I was
15 late a few times." Tr. 206. He currently supports himself with state assistance and
16 by working odd jobs. Tr. 55-56, 63. At the time of the administrative hearing,
17 Plaintiff was working a couple days a week, a total of about 10 hours, for a friend
18 who owned a tree service. Tr. 56-57. He indicating he performed this part-time
19 work putting branches in a chipper every couple of weeks. Tr. 57. Plaintiff
20 testified at the administrative hearing he had also worked about 10 hours a week
21 from December 2009 to April 2010 cutting and welding steel for an artist who
22 worked with metal. Tr. 57-58. He stated he could not go back to work as a welder
23 or perform full-time work for the tree service company because "my back won't
24 handle all that work." Tr. 58. He indicated he would likely miss 10 to 15 days of
25 work in a typical month because of his back. Tr. 67.

26 Plaintiff testified back pain made it difficult for him to bend over and pick
27 things up. Tr. 62. He stated standing affects him, and he can only sit for 30
28 minutes to an hour before he has to stand and walk around. Tr. 63. He indicated

1 he needs to lie down for an hour or more, two to three times a day, because of his
2 back pain. Tr. 65. Plaintiff also described numbness in his hands as a result of his
3 back issue which made it difficult to hold things like a rake or hammer. Tr. 59. He
4 stated his sleep was also affected, and he only gets about three or four hours of
5 sleep at night. Tr. 66, 223. Nevertheless, at the time of the administrative hearing,
6 Plaintiff was not taking medications for his back and was not receiving regular
7 medical care. Tr. 62-63. He stated he was not doing anything to relieve his back
8 pain other than lying down throughout the day. Tr. 65.

9 Plaintiff testified his typical day consists of staying at home watching TV or
10 listening to the radio. Tr. 65-66. The "Function Report" Plaintiff filled out on
11 November 2, 2010, indicates his daily activities are watching TV; using a
12 computer; sitting outside; making breakfast, lunch and dinner; and going to see
13 friends. Tr. 222. It also indicates Plaintiff did laundry, performed light household
14 repairs and shopped for groceries once a week. Tr. 224-225. He wrote he would
15 visit, play video games and/or go to the movies with friends a few times a week.
16 Tr. 226.

17 When asked about alcohol and drugs at the December 19, 2012,
18 administrative hearing, he indicated he had not had a drink in five months and was
19 attending AA meetings, but last used marijuana the day prior to the hearing and
20 was smoking marijuana "about every day." Tr. 59-60. Plaintiff stated marijuana
21 was helpful in reducing his back pain. Tr. 66. Plaintiff testified he also smoked
22 less than a pack of cigarettes per day. Tr. 65.

23 May 4, 2010, imaging of Plaintiff's cervical spine revealed multilevel
24 degenerative changes of the cervical spine. Tr. 271-272. May 4, 2010, imaging of
25 Plaintiff's lumbar spine revealed moderate to marked degenerative disk disease at
26 L3/L4, possibly post infectious; mild to moderate L2/L3 and L4/L5 degenerative
27 disk disease; and probable, bilateral L5 pars interarticularis defects. Tr. 273-274.
28 June 18, 2010, MRIs of Plaintiff's cervical and lumber spine revealed multilevel

1 degenerative disk changes. Tr. 275-280. These image reports predate the July 18,
2 2010, alleged onset date.

3 Plaintiff was examined by Harry Burger, DO, on December 4, 2010. Tr.
4 288-291. Dr. Burger indicated Plaintiff reported smoking a pack of cigarettes a
5 day despite using inhalers, regularly smoking marijuana, and drinking at least a
6 six-pack a day. Tr. 288. It was noted Plaintiff “is aware that he is injuring himself
7 and that he continues to injure himself.” Tr. 288. Plaintiff reported prior
8 intravenous drug use, which resulted in a hepatitis C diagnosis in 2006, but denied
9 current use of IV drugs. Tr. 288-289. Plaintiff informed Dr. Burger he could stand
10 for 30 minutes, sit for 15 minutes, walk a mile, and lift 20 to 30 pounds. Tr. 289.

11 On exam, Dr. Burger noted Plaintiff was in no acute distress, ambulated
12 normally, was able to get on and off the table and up and out of the chair well, and
13 could dress and undress himself well. Tr. 290. With respect to the spine and
14 extremities, Dr. Burger indicated as follows:

15 Reveal normal-appearing lordosis and kyphosis to the spine. No disc space
16 protrusions, masses, deformities or tenderness. Extremities reveal pulses to
17 be present, strong and equal bilaterally in the upper and lower extremities.
18 No edema, cyanosis, clubbing, swelling, redness or effusions [T]he
19 hips, knees and ankles appear normal. No effusion, no instability signs, no
20 deformities. The shoulders, elbows and wrists appear normal. No signs of
21 ligamentous or nerve entrapment or muscle atrophy. Grip strength is strong
22 5/5 right and left without pain. His gait reveals no limp or antalgia today or
23 assisting devices. Ranges of motion reveals normal movement of the
24 elbows, forearms, wrists, shoulders, cervical spine, and lumbar spine. He
25 can reach down and touch his shoes from a standing position which is
26 normal anterior flexion of 90/90 with no complaints of low back or leg pain.
Hips, knees and ankles move normally. He can lay back on the table, he can
sit straight back up, he can straight leg raise normally supine and sitting with
no complaints of low back or left thigh pain. He can walk on his heels, walk
on his toes, squat, do heel-to-toe. No ulcerations, no varicosities.

27 Tr. 290. Dr. Burger indicated that while Plaintiff sustained a low back injury in
28 1994, Plaintiff has had no additional injuries and it has not restricted him over the

1 years. Tr. 291. Dr. Burger related that Plaintiff's reason for not working was that
2 he could not find work. Tr. 291.

3 On April 13, 2011, state agency reviewing physician Mark A. Werner, M.D.,
4 completed a physical residual functional capacity assessment form finding Plaintiff
5 was limited to medium exertion level work with the additional restrictions of
6 needing to avoid concentrated exposure to extreme cold and fumes, odors, dusts,
7 gases, poor ventilation, etc., due to possible COPD. Tr. 306-313. Dr. Werner
8 considered the entire record, including the 2010 imaging reports, and specifically
9 noted Dr. Burger's fairly normal examination results. Tr. 311, 313.

10 On June 30, 2011, state agency reviewing physician Allen Gelinas, M.D.,
11 reviewed the record and concurred with Dr. Werner's findings. Tr. 111. Dr.
12 Gelinas opined that the assessment of Dr. Werner was well within the scope of the
13 records. Tr. 111.

14 **STANDARD OF REVIEW**

15 The ALJ is responsible for determining credibility, resolving conflicts in
16 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
17 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
18 although deference is owed to a reasonable construction of the applicable statutes.
19 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ
20 may be reversed only if it is not supported by substantial evidence or if it is based
21 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
22 evidence is defined as being more than a mere scintilla, but less than a
23 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant
24 evidence as a reasonable mind might accept as adequate to support a conclusion.
25 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to
26 more than one rational interpretation, the court may not substitute its judgment for
27 that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec.*
28 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by

1 substantial evidence will still be set aside if the proper legal standards were not
 2 applied in weighing the evidence and making the decision. *Browner v. Secretary*
 3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial
 4 evidence exists to support the administrative findings, or if conflicting evidence
 5 exists that will support a finding of either disability or non-disability, the ALJ's
 6 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
 7 Cir. 1987).

8 **SEQUENTIAL EVALUATION PROCESS**

9 The Commissioner has established a five-step sequential evaluation process
 10 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 11 416.920(a); *see, Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 12 through four, the burden of proof rests upon the claimant to establish a prima facie
 13 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 14 burden is met once a claimant establishes that a physical or mental impairment
 15 prevents him from engaging in his previous occupation. 20 C.F.R. §§
 16 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
 17 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
 18 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
 19 in the national economy which claimant can perform. *Batson v. Commissioner of*
 20 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
 21 an adjustment to other work in the national economy, a finding of "disabled" is
 22 made. 20 C.F.R. §§ 404.1520(a)(4)(i-v), 416.920(a)(4)(i-v).

23 **ADMINISTRATIVE DECISION**

24 The ALJ found Plaintiff had not engaged in substantial gainful activity since
 25 July 18, 2010, the alleged onset date. Tr. 12. At step two, the ALJ determined
 26 Plaintiff had the severe impairments of degenerative disk disease of the cervical
 27 and lumbar spine. Tr. 12. At step three, the ALJ found Plaintiff did not have an
 28 impairment or combination of impairments that meets or medically equals the

1 severity of one of the listed impairments. Tr. 14. The ALJ assessed Plaintiff's
2 RFC and determined he could perform light exertion level work, except that he
3 must avoid concentrated exposure to extreme cold, fumes, odors, dust, gases and
4 poor ventilation and avoid concentrated exposure to vibration and hazards such as
5 moving machinery and unprotected heights. Tr. 14.

6 At step four, the ALJ found Plaintiff was unable to perform his past relevant
7 work as a welder. Tr. 18. However, at step five, the ALJ determined that,
8 considering Plaintiff's age, education, work experience and RFC, and based on the
9 testimony of the vocational expert, there were other jobs that Plaintiff could
10 perform that exist in significant numbers in the national economy, including the
11 jobs of cafeteria attendant, housekeeping cleaner, and production assembler. Tr.
12 18-19. The ALJ thus concluded Plaintiff was not under a disability within the
13 meaning of the Social Security Act at any time from July 18, 2010, the alleged
14 onset date, through the date of the ALJ's decision, February 7, 2013. Tr. 19.

15 ISSUES

16 The question presented is whether substantial evidence exists to support the
17 ALJ's decision denying benefits and, if so, whether that decision is based on
18 proper legal standards. Plaintiff contends the ALJ erred by (1) improperly
19 rejecting his subjective complaints; (2) failing to fully and fairly develop the
20 record; and (3) presenting a hypothetical to the vocational expert which failed to
21 account for all of his limitations.

22 DISCUSSION

23 A. Plaintiff's Credibility

24 Plaintiff contends the ALJ erred by failing to provide valid reasons for
25 rejecting his subjective complaints. ECF No. 14 at 8-13. The Court agrees.

26 It is the province of the ALJ to make credibility determinations. *Andrews v.*
27 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be
28 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231

(9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

In this case, the ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms; however, Plaintiff's statements concerning the intensity, persistence and limiting effects of the symptoms were not credible. Tr. 15.

With regard to this credibility determination, the ALJ indicated the record reflected noncompliance issues. Tr. 15. Noncompliance with medical care or unexplained or inadequately explained reasons for failing to seek medical treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

The ALJ cited a report from May 2010, two months prior to the alleged onset date, which indicates Plaintiff left an emergency room without being treated by a physician. Tr. 15, 269. Not only is this record from outside the relevant time period in this matter, *see Fair v. Bowen*, 885 F.2d at 600 (medical opinions that predate the alleged onset of disability are of limited relevance), there is no evidence explaining why Plaintiff left the emergency room at that time. The ALJ's assertion that this report demonstrated noncompliance is unsupported.

The ALJ additionally mentioned Plaintiff's history of substance abuse as bearing on Plaintiff's credibility. Tr. 16. An ALJ may properly consider evidence

1 of a claimant's substance use in assessing credibility. *Thomas v. Barnhart*, 278
2 F.3d 947, 959 (9th Cir. 2002) (ALJ's finding that claimant was not a reliable
3 historian regarding drug and alcohol usage supports negative credibility
4 determination); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999)
5 (conflicting or inconsistent testimony concerning alcohol or drug use can
6 contribute to an adverse credibility finding); *Edlund v. Massanari*, 253 F.3d 1152,
7 1157 (9th Cir. 2001) (ALJ properly considered drug-seeking behavior).

8 The ALJ noted Plaintiff admitted to Dr. Burger that he regularly smoked
9 marijuana, but was not part of a medical marijuana program, and that he drank at
10 least a six-pack a day even though he had been diagnosed with hepatitis C in 2006.
11 Tr. 16. There are, however, no noted inconsistencies regarding Plaintiff's report of
12 substance use and no evidence of record that Plaintiff displayed drug-seeking
13 behavior. Moreover, Plaintiff testified at the administrative hearing that he could
14 not go back to work because "my back won't handle all that work," Tr. 58, and
15 indicated back issues would likely cause him to miss 10 to 15 days of work in a
16 typical month, Tr. 67. There is no explanation by the ALJ as to how Plaintiff's
17 consumption of alcohol and marijuana use aggravated his back impairment or
18 otherwise diminished his overall credibility. It was inappropriate for the ALJ to
19 find Plaintiff's use of alcohol and marijuana reduced his credibility. Tr. 16.

20 The ALJ indicated the medical evidence of record does not support
21 Plaintiff's assertions about his inability to work. Tr. 15. A lack of supporting
22 objective medical evidence is a factor which may be considered in evaluating a
23 claimant's credibility, provided it is not the sole factor. *Bunnell v. Sullivan*, 347
24 F.2d 341, 345 (9th Cir. 1991).

25 The ALJ noted Dr. Burger's independent physical examination was
26 unremarkable regarding Plaintiff's neck/back problems and the record did not
27 contain any evidence of surgical intervention or more invasive treatment. Tr. 15,
28 290-291. As noted by the ALJ, Dr. Burger's report identified Plaintiff's reason for

1 not working as an inability to find work, not as a result of limitations stemming
2 from injuries/impairments. Tr. 17, 291. In addition, Plaintiff testified at the
3 administrative hearing that he was not taking medications for his back and was not
4 receiving regular medical care. Tr. 62-63. He stated he was not doing anything to
5 relieve his back symptoms other than periodically lying down during the day. Tr.
6 65. Nevertheless, April and June 2010 imaging of Plaintiff's cervical and lumbar
7 spine revealed multilevel degenerative disk changes and evidence of degenerative
8 disk disease. Tr. 271-280. The record is thus not devoid of reports evidencing
9 Plaintiff's severe back impairment. Plaintiff's complaints of neck and back pain
10 are not unsubstantiated by the objective evidence of record.

11 The ALJ further noted the record revealed Plaintiff had worked with his
12 allegedly disabling impairments. Tr. 15. The ability to work can be considered in
13 assessing credibility. *Bray v. Comm'r Social Security Admin.*, 554 F.3d 1219,
14 1227 (9th Cir. 2009) (finding the ALJ properly discounted a plaintiff's testimony
15 because she recently worked as a personal caregiver for two years and had since
16 sought out other employment).

17 The ALJ indicated Plaintiff testified at the administrative hearing that he was
18 working a couple days a week, a total of about 10 hours, for a friend who owned a
19 tree service. Tr. 15, 56-57. Plaintiff stated he performed this part-time work every
20 couple of weeks. Tr. 15, 57. Plaintiff testified the job consisted of putting
21 branches in a chipper, and he would lift up to 30 pounds and would have to bend
22 over to pick up the branches. Tr. 15, 57, 63-64. The ALJ also noted Plaintiff
23 reported he had experienced neck pain since he was a teenager, with chronic pain
24 since 2006, which showed Plaintiff had been able to work for several years despite
25 his alleged symptoms. Tr. 15.

26 In evaluating whether a claimant satisfies the disability criteria, the
27 Commissioner must evaluate a claimant's "ability to work on a *sustained* basis."
28 20 C.F.R. § 404.1512(a) (emphasis added). "Occasional symptom-free periods—

1 and even the sporadic ability to work—are not inconsistent with disability.”
2 *Lester*, 81 F.3d at 833 (citing *Leidler v. Sullivan*, 885 F.2d 291, 292 n. 3 (5th Cir.
3 1989)). Furthermore, according to the Social Security Rules, in evaluating a
4 claimant’s RFC, the ALJ’s assessment must consider an individual’s ability to
5 perform “sustained work activities in an ordinary work setting on a regular and
6 continuing basis.” SSR 02–01p. “A ‘regular and continuing basis’ means 8 hours
7 a day, for 5 days a week, or an equivalent work schedule.” SSR 96–8p at 1. There
8 is no evidence of record that Plaintiff has worked on a regular and continuous basis
9 since the alleged onset date.

10 Lastly, the ALJ held that Plaintiff’s ability to “perform a full range of daily
11 activities” was inconsistent with the nature, severity and subjective complaints of
12 Plaintiff. Tr. 16. It is well-established that the nature of daily activities may be
13 considered when evaluating credibility. *Fair v. Bowen*, 885 F.2d at 603.

14 The ALJ indicated Plaintiff reported shopping, using public transportation
15 and the ability to drive a car; he watched television, used a computer, sat outside
16 and prepared simple meals; he visited with friends and performed light household
17 chores, like laundry and repairs; and he was able to walk a mile or more without
18 difficulty and play video games with friends several times a week. Tr. 16, 222-
19 226, 313. While it was not improper for the ALJ to consider Plaintiff’s level of
20 activity in this case when assessing his credibility, the Ninth Circuit has held that
21 one does not need to be “utterly incapacitated” to be disabled. *Fair v. Bowen*, 885
22 F.2d at 603 (“claimant’s ability to engage in activities that were sporadic and
23 punctuated with rest, such as housework, occasional weekend trips, and some
24 exercise, do not support a finding that he can engage in regular work activities”).
25 As argued by Plaintiff, his reported daily activities are not necessarily inconsistent
26 with his description of limitations.

27 The ALJ is responsible for reviewing the evidence and resolving conflicts or
28 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.

1 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
3 determining whether the ALJ's decision is supported by substantial evidence and
4 may not substitute its own judgment for that of the ALJ even if it might justifiably
5 have reached a different result upon de novo review. 42 U.S.C. § 405(g).
6 However, based on the foregoing, the Court concludes that the rationale provided
7 by the ALJ for discrediting Plaintiff is not clear and convincing. The Court finds
8 that a remand for a proper credibility determination is necessary in this case.

9 **B. Additional Arguments**

10 Plaintiff next contends the ALJ erred by failing to fully and fairly develop
11 the record. ECF No. 14 at 13-14. Plaintiff opines that the findings of the only
12 consultative examiner of record, Dr. Burger, contrast with the 2010 pre-onset date
13 imaging results, thus the ALJ "was required to further develop the record in order
14 to support a finding of not disabled." ECF No. 14 at 14. Plaintiff also argues the
15 ALJ erred by not including all of Plaintiff's functional limitations in her RFC
16 determination, thus resulting in the presentation of an incomplete hypothetical to
17 the vocational expert (VE). ECF No. 14 at 15-16.

18 Plaintiff ultimately bears the burden of establishing his disability. 42 U.S.C.
19 § 423(d)(5) ("An individual shall not be considered to be under a disability unless
20 he furnishes such medical and other evidence of the existence thereof as the
21 Secretary may require."); *see also* 20 C.F.R. § 404.1512(c) ("You must provide
22 medical evidence showing that you have impairment(s) and how severe it is during
23 the time you say you are disabled."). However, the ALJ does have a special duty
24 to develop the record fully and fairly and to ensure that the claimant's interests are
25 considered, even when the claimant is represented by counsel. *Tonapetyan v.*
26 *Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443
27 (9th Cir. 1983). An ALJ's duty to develop the record is triggered when there is
28 ambiguous evidence or when the record is inadequate to allow for proper

1 evaluation of the evidence. *Tonapetyan*, 242 F.3d at 1150.

2 As determined above, in light of the ALJ's erroneous credibility
3 determination, this matter will be remanded for additional proceedings. On
4 remand, the ALJ shall reconsider Plaintiff's statements and testimony. The ALJ
5 shall additionally reassess Plaintiff's RFC, taking into consideration the opinions
6 of Dr. Burger, Tr. 288-291, and the state agency reviewing physicians, Drs.
7 Werner and Gelinas, Tr. 111, 306-313; the April and June 2010 imaging of
8 Plaintiff's cervical and lumbar spine, Tr. 271-280; and all other medical evidence
9 of record relevant to Plaintiff's claim for disability benefits. The ALJ shall direct
10 Plaintiff to undergo a new consultative physical examination. At the new
11 administrative hearing, the ALJ, if warranted, shall elicit the testimony of a
12 medical expert to assist the ALJ in formulating a new RFC determination. The
13 ALJ shall present the new RFC assessment to a vocational expert to help determine
14 if Plaintiff is capable of performing any other work existing in sufficient numbers
15 in the national economy.

16 CONCLUSION

17 Plaintiff argues the ALJ's decision should be reversed and remanded for an
18 immediate award benefits. The Court has the discretion to remand the case for
19 additional evidence and findings or to award benefits. *Smolen*, 80 F.3d at 1292.
20 The Court may award benefits if the record is fully developed and further
21 administrative proceedings would serve no useful purpose. *Id.* Remand is
22 appropriate when additional administrative proceedings could remedy defects.
23 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
24 finds that further development is necessary for a proper determination to be made.

25 On remand, the ALJ shall reexamine Plaintiff's statements and testimony
26 and reassess Plaintiff's RFC, taking into consideration the opinions of Dr. Burger,
27 and the state agency reviewing physicians, the April and June 2010 imaging
28 reports, and all other medical evidence of record relevant to Plaintiff's claim for

1 disability benefits. The ALJ shall develop the record further by requiring Plaintiff
2 to undergo a new consultative physical examination prior to a new administrative
3 hearing and, if warranted, by eliciting the testimony of a medical expert to assist
4 the ALJ in formulating a new RFC determination. The ALJ shall obtain
5 supplemental testimony from a vocational expert and take into consideration any
6 other evidence or testimony relevant to Plaintiff's disability claim.

7 Accordingly, **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
9 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
10 additional proceedings consistent with this Order.

11 2. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
12 **DENIED**.

13 3. Application for attorney fees may be filed by separate motion.

14 The District Court Executive is directed to file this Order and provide a copy
15 to counsel for Plaintiff and Defendant. **Judgment shall be entered in favor of**
16 **Plaintiff**, and the file shall be **CLOSED**.

17 DATED February 18, 2015.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE